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SUPREME COURT, U.S.

NO. 82-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DAVID J. BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of David J. Brown and request that this Court deny the petition on the basis of facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

David J. Brown was tried, convicted and sentenced to death on each of two counts for first degree murder in the Superior Court of Union County, North Carolina. In an opinion reported in State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982), the Supreme Court of North Carolina found no error in either of the convictions and affirmed the sentences of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. DID DENIAL OF DEFENDANT BROWN'S REQUEST TO VIEW THE CRIME SCENE AMOUNT TO A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND IF SO, WAS SUCH DENIAL PREJUDICIAL ERROR?

II. IS THE OPINION OF THE NORTH CAROLINA SUPREME COURT IN CONFLICT WITH BUMPER v. NORTH CAROLINA, 391 U.S. 543 (1968), WHEN INFORMED CONSENT WAS USED FOR JUSTIFICATION FOR A SEARCH EVEN THOUGH A SEARCH WARRANT WAS ISSUED AND THE CONSENTER ARRESTED AFTER THE SEARCH BEGAN?

III. SHOULD THIS COURT REVIEW THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF STATE LAW WHICH IS CORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW?

STATEMENT OF THE CASE

On August 28, 1980, the petitioner, David J. Brown, was charged with two counts of murder. He was charged that on or about August 25, 1980, he killed Shelly Diane Chalflinch, age twenty-six, and her daughter Christina S. Chalflinch, age nine (R pp 1-3). The petitioner was indicted on two counts of first degree murder (R pp 3-6). The case came on for trial on December 8, 1980, before the Honorable Julius A. Rousseau, Jr. The jury returned verdicts of guilty on two counts of first degree murder on December 18, 1980 (R p 140) and following the sentencing hearing verdicts of death were returned in both cases on December 20, 1980 (R pp 233-235). In apt time the petitioner appealed to the North Carolina Supreme Court which affirmed the findings and sentences. State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982)

At the trial the State presented evidence which showed that on August 25, 1980, the victims, a mother and her young daughter, lived in Apartment 9 in a complex called Marriage Quarters behind the Pinehurst Hotel in Pinehurst, North Carolina. (R pp 52-53). At approximately 8:15 a.m. on

Tuesday, August 26, 1980, the bodies of Ms. Chalflinch and her daughter were found in a mutilated condition in the Chalflinch apartment. Police officers entered the apartment, saw blood on the floor and walls of the apartment. Pieces of flesh were scattered throughout the living area of the apartment. (R p 55). Ms. Chalflinch's body had been mutilated to the point that one of the officers, who knew her, could not recognize her. She had stab and cutting wounds all over her body with at least twenty separate cut and stab wounds to the face area, all of them relatively superficial. There were twelve separate stab wounds as well as small scraps and superficial cuts on the neck area. Some of the cuts were actually into the larynx. There were several cuts on the front chest area and small puncture wounds on both sides of the chest and the breast area. There were several stab wounds on the chest area, one below the left collar bone that passed through the upper part of the left lung through the upper part of the chest and into the tissue of the back. On the right arm there were sixteen separate stab wounds, some going through the arm. There was a single puncture wound below the buttocks area on the left. A large gapping cut extended from the left leg through the buttocks to the ankle. There were several small cuts adjacent to it. In the genital area, there was a V-shaped penetrating stab wound that passed along the left side of the vagina into the rectum, from which extended several feet of small intestines. There were two separate stab wounds adjacent to this wound. There were somewhere in the order of one hundred wounds. The wound in the genital area was so large that the pathologist could place his own hand and arm through the wound into the area of the liver. In this area behind the liver was found a ring (R pp 73-74). This ring was identified by four witnesses to be that of the defendant. (R pp 73-74, 89, 93, 94, 111). Some of the wounds described, especially those on the arms, would best be described as defensive wounds. (R p 75).

The body of Christina, the daughter, was found in the bedroom. The upper portion of her body was clothed. (R p 55). The body of Christy Chalflinch was mutilated with mutiple stabs, slices, puncture marks with extensive mutilation of the genital area. The head had a large number of stab wounds, and one of them extended into the bone over the right temple, and one to the upper left that knocked out the incisor. There was an electrical cord partially wrapped around the neck of Christy Chalflinch that left a faint purplish mark. There were multiple wounds on the chest, four of which appeared to be penetrating. There were several penetrating wounds on the abdomen. The legs had a few slash marks and a stab on the left front of the thigh. There were a large number of stabs or cuts on both arms going primarily through the back of the hand and forearm and a cut on the hand suggesting the hand might have grabbed a sharp object. There was extensive mutilation of the genitals, with a portion of the tissue removed. There were also a number of cuts, slashes and small puncture wounds on the skin. The head wound extended through the brain from left to right. (R pp 75-76).

When the police arrived, the apartment was very hot. (R p 55). The bodies had begun to decompose at this time. (R p 73).

A search of Apartment 9, where the bodies were found, revealed a broken knife blade with the inscription "R. H. Forschne". Human blood was found on this blade. (R p 58). There was also blood all over the floor, living room floor, and on the left wall of the living room.

Blood was found in the area immediately outside the front door of Apartment 9 and along the wooden deck in front of the apartment. Blood was found on the fourth and tenth steps, as well as between the concrete pad and the first stepping stone at the bottom of the stairs. This blood resembled the shape of a bare foot. At the door of Apartment 4, the petitioner's apartment, there was indication of blood on the concrete stoop just behind the air conditioner and on the door frame to the

apartment. (R p 82). To the left of the door frame, facing the door frame from the outside, blood was visible and a continuous stain from the outside to the "face" about 30 to 33 inches from the stoop as well as on the door knob. On the stoop a rounded smear was found with the outlines of smears to the right of it. (R pp 82-83).

The petitioner worked as a chef for the Pinehurst Hotel, (R p 89), and lived in Apartment 4 of the Marriage Quarters (R pp 105-106). On Sunday, August 24, 1980, he went with a friend to a party for 100 to 150 people where he consumed some alcohol and some pills. (R pp 90-91). Around midnight, the petitioner went with some others to a night spot, the Crash Landing. (R p 91). After leaving, the petitioner was picked up at approximately 2 a.m. by a local policeman as he walked barefooted along the highway near the Crash Landing. (R pp 104-105). The policeman drove petitioner to the Pinehurst Hotel. (R p 104). He was seen at the hotel from about 2:30 a.m. until 3:00 a.m. on the 25th of August, 1980 by the night shift supervisor, who characterized him as intoxicated (R pp 109, 110). At 7:00 a.m. on August 25, a coworker saw him in the kitchen and noticed his thumb was bandaged. (R p 93). Petitioner stated, although he did not testify, he had cut it while fixing a sandwich at home. (R pp 91, 109). After work, he went to the hospital for treatment (R p 115) and remained there until 4:10 a.m. on August 26, 1980 (R p 116).

On August 26, 27 and 28, petitioner was interviewed by the State Bureau of Investigation (SBI) agents (R p 117). During the course of the interview the petitioner was cooperative. He told Agent Anders that he had gone to a disco place called the Crash Landing. He stated that he was pretty high and decided to leave. He further stated that as he was walking along someone picked him up, he did not know who it was, and brought him to the front of his apartment. He stated that as he went inside, he had trouble getting into the door to his apartment. He said

he went in, took off his clothes and took a shower, went to the washroom and washed the clothes that he was wearing that night because they got messed up. When asked if he saw Mrs. Chalflinch, he stated that he could have seen her in the washroom while he was there. He was asked if he went to Mrs. Chalflinch's apartment. He said he could have helped her carry some clothes up there. He was asked if the pack of Koo cigarettes found at the top of the steps was his. He said that he could have dropped them when he went up there. He was further asked if he had been in Mrs. Chalflinch's apartment he stated no further than the living room. He stated further that he had not lost any jewelry. This interview took in all of a half hour. The petitioner went to the restroom and had a soft drink during this time. (R pp 176-177).

During the course of the interview Agent Anders asked petitioner if he wanted to call anyone. He was provided telephone and called a friend, Bobby Woods. Mr. Woods came in immediately. The talked briefly outside of the hearing of the agents. The petitioner was then asked to allow the police and the SBI to search his apartment. He agreed. A voluntary consent to search form was prepared. This form was read to him. The form reads as follows:

> I, David Junior Brown, the owner, operator or person responsible for or in charge of or in possession of certain property, to wit, Apartment 4, Marriage Quarters, having been informed of my constitutional rights not to have a search made of the above described premises, places, property or vehicle without a search warrant, and further informed of my right to refuse to consent to the search without a search warrant, do hereby voluntarily, understandingly, willingly and knowingly consent to the search without a search warrant and authorize Sgt. Don Davis and other representatives of the Pinehurst Police Department and representatives of the SBI to conduct a complete search of said above described premises located at Apartment 4, Marriage Quarters, on McLean Road, in Pinehurst, North Carolina. These officers are authorized by me to remove from this property any stolen or illegally possessed property, whiskey, contraband, or any other material of evidence of any crime which they may desire. This written consent is being given by me to the above officers and whatever assistance they may desire, voluntarily and without threat or promise of any kind, and with the

full knowledge that they do not have authority to make such search and seizure without a search warrant unless I consent thereto.

(R pp 71-72, 173-174).

The petitioner was released from custody at approximately 5:30 p.m. on this day. (R p 72). Around 8:00 p.m., August 28, 1980, several officers arrived at Mr. Brown's apartment. Mr. Brown was there at the time the search began. (R p 175). He assisted in the search by opening his toolbox (R p 84). About one to one and a half hours after the search had begun, petitioner was arrested and taken away. (R p 199). The search continued at least until 3:00 a.m. with extensive testing and the evidence gathered (R pp 83-85) in both the Brown and Chalflinch apartments (R p 81).

Pursuant to the consent to search, blood was found throughout the petitioner's apartment including on the door (R p 82), the living room carpet (R p 84), bloody footprints on the kitchen floor (R p 84), on the bedspread, on the handle to the broom, on the front door lock, on the wooden box, on the bedroom door frame, on the light switch panel in the bedroom, the chair and the light switch in the bedroom (R pp 84-85). In addition, the lid to the toolbox contained blood and human blood was found on a T-shirt and another shirt found in the apartment. None of the blood taken from the petitioner's apartment could be shown to belong specifically to either the petitioner or the victms. The petitioner and the victims had the same blood type, ABO Group O. The blood samples were insufficient to run a Haptoglobin test which would have allowed types to be differentiated among the three. None of the samples were inconsistent with the characteristics of the three persons involved. (R p 86).

Before trial, the petitioner requested, among other things, permission to inspect the crime scene (R pp 39-40, 41). This request was denied. (R p 41). The petitioner requested other items including "photographs of the premises of the defendant or

the premises of a victim of the alleged crime" (R p 27); "Any charts, diagrams, or sketches subject to use as evidence, including those of premises of a victim of the alleged crime, the scene of the crime..." (R p 28). The petitioner's attorneys were allowed to view all of the photographs. Petitioner's attorneys stated during the course of the trial "we have got photographs after photographs, we have got measurements" (R p 197). The district attorney also stated during the trial "they have got diagrams, as a matter of fact they are knowledgeable of a very blueprint, to scale, that they have been shown of that apartment, to scale, even seen the blueprint, footage set out on the blueprint prepared by the architect. They know the dimensions of the victims' apartment, the window, the whole thing". (R p 197).

During the sentencing phase, the State offered testimony of Roy Brown. Mr. Brown, who was not related to the petitioner, had been in the "drunk tank" awaiting trial on several misdemeanor and felony charges when the petitioner was jailed in a nearby cell. (R p 141). The petitioner talked of the murders soon after arriving. He said he was in jail for a double homicide for murdering two people. He called one of their names Shelly. He told witness Brown that he had killed them with a knife. He stated to witness Brown that "he couldn't understand why they didn't given him his ring back. That they gave him his watch back, and it got broke off his arm, the band broke off, and I asked him where his ring was or something, I don't recall exactly what I asked him, but anyhow he said the ring turned up in one of the bodies." (R p 141).

REASONS FOR NOT GRANTING THE WRIT

I. THE PETITIONER WAS NOT DENIED ANY CONSTITUTIONAL RIGHT BY BEING DENIED ACCESS TO THE CRIME SCENE AND ANY ERROR WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT.

The petitioner is requesting this Court review the determination by the North Carolina Supreme Court that the refusal to grant him permission to personally inspect the crime scene was harmless error. He contends that such a denial violated his right to due process and effective assistance of counsel under the sixth and fourteenth amendments to the United States Constitution. He attempts to boot strap this denial with other proper rulings on pretrial issues to show a lack of due process. This Court should first deny this petition because there is no constitutional question presented.

This Court has consistently held that except for exculpatory evidence the due process clause is not concerned with discovery in state court criminal trials.

> There is no general constitutional right to discovery in a criminal case, and Brady [Brady v. Maryland, 373 U.S. 83 (1963)] did not create one; as the court wrote recently, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded....." Wardius v. Oregon, 412 U.S. 470, 474 (1973). Brady is not implicated here where the only claim is that the state should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial.

Weatherford v. Bursey, 492 U.S. 545, 559-560 (1977). There is, therefore, no constitutional right to discovery in a criminal trial. This issue raises no constitutional question and the Court should deny the petition for this reason.

The petitioner contends that this issue has been conclusively decided by the North Carolina Supreme Court. The North Carolina Supreme Court did find that under the facts of this case where the police preserve the crime scene for several months, it was a "denial of fundamental fairness and due process for defendant to be denied, under police prosecutorial supervision, a limited inspection of the premises of the crime scene." At 293 S.E.2d at 578.

It is equally well-settled in our law that this Court and not a state court must determine the parameters of constitutional protection under the federal constitution.

> "...a state can neither add to nor substract from the mandates of the United States Constitution."

North Carolina v. Butler, 441 U.S. 369, 376 (1979).

A state supreme court can impose stricter requirements than the federal constitution if it is based solely upon the state constitution or state law.

> But, of course, a state may not impose such greater restrictions as a matter of federal constitutional law when this court specifically refrains from imposing them.

Oregon v. Hass, 420 U.S. 714, 719 (1975).

The Supreme Court of North Carolina is not empowered to determine this issue for this Court. This Court has previously determined that a constitutional violation requires more of a showing than this petitioner has made.

> ...When the Government has been responsible for delay resulting in a loss of evidence to the accused, we have recognized that constitutional violation only when such loss of evidence prejudice the defense.

United States v. Valenzuela-Bernal, ___ U.S. ___, 73 L.Ed.2d 1197, 1203 (81-450, decided July 2, 1982).

The loss of evidence here, if there was any evidence at all, has not been shown to be prejudicial to the petitioner. The requirement of prejudice, apparently, is different from the harmless error reasoning of Chapman v. California, 386 U.S. 18 (1967). The petitioner is required to make a threshold showing that the evidence that he could not obtain was "highly relevant" to his case. Id. at 1204. The petitioner must show the evidence would have been favorable and material. United States v. Lovasco, 431 U.S. 783 (1976); United States v. Marion, 404 U.S. 307 (1971). The evidence must be more than just relevant or favorable, it must be "highly relevant" to the point that a fair trial was denied.

> Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth

> Amendment from the cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to the Due Process Clause. Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it, we must find that the absence of that fairness fatally infected the trial, the acts complained of must be of such quality as necessarily prevent a fair trial." Lisenba v. California, 314 U.S. 219, 236, 86 L.Ed. 166, 62 S.Ct. 280 (1941).

United States v. Valenzula-Bernal, supra, at 1204. In other words, the trial must amount to more of a spectacle or trial by ordeal than a disciplined contest. United States v. Augenblick, 393 U.S. 348 (1969).

Upon examination of the evidence the petitioner speculates he could have found had he been allowed into the crime scene, clearly there was no constitutional violation. This is so, despite the determination of the North Carolina Supreme Court. The record clearly indicates that numerous photographs were provided to the petitioner and the petitioner admitted during the course of the proceedings that he looked at all the photographs (R pp 66 and 197). The petitioner speculates that two "possible" items of evidence may have been present. The first involves jewelry found scattered on the floor of the apartment. He contends that evidence at the crime scene may have afforded some explanation for the presence of the ring found in the body cavity of one victim, behind her liver. (Petition p. 10). Why a view of the photographs was not sufficient is not shown by the petitioner. The petitioner did elicit on cross-examination the fact the jewelry was scattered about the floor of the apartment (R p 66). It is speculation that walking around an apartment several months after the murder has occurred, (surely the jewelry has been removed), would allow counsel to dream up an explanation for the presence of the petitioner's ring in the body cavity of one of the victims. This is especially true when several witnesses identified the very distinct ring as belonging to the petitioner. (R pp 89 and

94) and one testified he had the ring on his finger at 5:00 p.m. on Sunday, August 24, 1980 (R pp 92, 93). It is pure speculation to assume that defense counsel could explain how the petitioner's ring came to be found inside the body cavity, behind the liver, of one of the victims by looking at the floor of an apartment when a photograph of the apartment could not provide the same information.

The second item of evidence that the petitioner claims he "possibly" "may" have been able to find was a single newspaper dated later than August 24, a single prescription bottle or sales slip bearing such a date, anything purchased that would be traced to a date later than the 24th. (Petition, p. 11). Again, this is pure speculation. First, the Court does not have the benefit of all the photographs of the apartment. The petitioner brings forward no indication of a photograph of a newspaper, a prescription or a sales slip anywhere within the apartment. The petitioner, likewise, failed to cross-examine the defense witnesses concerning the presence of a newspaper, a prescription bottle or sales slip. Since the State has the burden of proving beyond a reasonable doubt, similar impact can be had by cross-examination: Did you see a newspaper within the apartment? Did you check the date? Why didn't you check the date? Could the date have been August 25, 1982? Was there a prescription bottle in the medicine cabinet? Did you look? Did you check the dates on the prescription bottles? Did you see any sales slips? Did you check the dates on the sales slips?

There was detailed testimony concerning the apartment itself given by Office Don Davis. (R pp 57-71). Robert Duncan, an SBI agent assigned to the Latent Evidence Section, also testified in detail and introduced pictures of portions of the walls contained in the bedroom. (R pp 77-81). Joel Morris of the SBI also entered Apartment 9 and described what he saw. (R pp 107-108). The petitioner, according to the record, failed to attempt to develop his theory he now asserts in his petition.

He had an ample opportunity to cross-examine witnesses and develop the same information that he claims he lacks by not being given access to the apartment.

Additionally, the petitioner asserted at trial that the reason for the inspection was to determine if the assailant could have reached through a window and opened the door. (R p 197). Such a determination could have been made by the photographs and the diagrams.

The petitioner has failed to show that any possible error amounted to the level of a constitutional error and therefore this Court should deny this petition.

If this Court finds that the error is one of constitutional dimension, the finding of the North Carolina Supreme Court that the error was harmless beyond any doubt controls in this situation. This rule most succintly enunciated in Chapman v. California, 386 U.S. 18 (1967), required the person asserting error to show a constitutional error, as opposed to an error in state procedure or law. The state must then show that the federal constitutional error was "harmless beyond a reasonable doubt". Id. at 24.

The petitioner attempts to boot strap his argument of denial of access to the crime scene with other discovery motions which were, admittedly, properly denied. The petitioner did not raise the propriety of such rulings in the state supreme court other than to mention their denial in the context of this issue. Even considering these factors together with denial of access, there is no basis for determining that the error is prejudicial.

The two types of evidence that the petitioner asserts could possible have been of benefit to him from an inspection of the crime scene is an explanation of how the petitioner's ring appeared in the body cavity of one of the victims and an object which shows when the victim was last actually alive. As previously indicated, there were photographs of the apartment, the jewelry would have been picked up by the time the petitioner

was allowed to enter the apartment. There is no possibility that he could have obtained some evidence which would have in any way cast any doubt in the jury's mind on how the petitioner's ring could have been deposited behind the liver of one of the victims.

The second item of evidence the petitioner contends is crucial is the speculation that he may have been able to find a newspaper dated later than August 24, a single prescription bottle or sales slip bearing a later date or anything purchased that could be traced to a later date. Assuming for purposes of argument that the petitioner's dream came true and he found an item dated August 25, 1980, and there was further some evidence that either the mother or daughter had that item in her possession, the outcome of the trial would not have been affected. The petitioner speculates that he could have shown the victims to be alived on Monday, August 25, or even possibly Tuesday, August 26, that he would have an alibi by being in the hospital for treatment on a lacerated left hand. (R pp 115-116).

The evidence is still overwhelming. The petitioner may have had an alibi versus two dead victims found in his apartment complex. (R pp 55 and 105, 106). Ms. Chalflinch and her daughter were mutilated and killed by multiple deep stab wounds. (R pp 74, 76). Blood was throughout their apartment. (R p 58). A palm print was found in part of a blood smear on the wall. (R p 80). The palm print was the left palm print of the petitioner. (R p 79). The broken blade of the knife found in the victims' apartment made by -R.H. Forschne- is the same used by the petitioner and some were found in a box in his apartment. (R pp 60, 61). The knives found in the toolbox in petitioner's apartment was tested positive for blood. There were indications of blood in the petitioner's apartment, including on the front door, the living room rug, and bare foot prints on the kitchen floor. (R p 84). He was found walking barefooted during the

early morning hours of August 25. (R pp 103, 104). The petitioner's ring was found inside the body cavity of one of the two victims. (R pp 74, 89, 93, 94). The State also chose to hold for the punishment phase a jail cell confession by the petitioner. This also could have been introduced at the guilt phase but the prosecutor chose to hold it. The statements were made by the petitioner to a cell mate where he talked about having killed two people with a knife and one of their names was Shelly. He was more concerned about getting his ring back than his situation. Additional evidence concerning his confession was excluded from consideration at the punishment phase and would probably have been excluded at the guilt phase. (R pp 204-207). The State also did not present to the jury that the petitioner said he "could" have seen the victims and been in her apartment in the early morning hours of August 25. (R p 177).

When all of this evidence is weighed against the possibility of an alibi there is no showing that a different result likely would have ensued. The North Carolina Supreme Court was correct in all respects in determining that the error was harmless beyond any possible doubt. Certiorari should be denied on this issue.

II. THIS COURT SHOULD NOT GRANT THIS WRIT OF CERTIORARI BECAUSE THE DECISION OF THE NORTH CAROLINA SUPREME COURT WAS NOT IN CONFLICT WITH BUMPER v. NORTH CAROLINA, 391 U.S. 543 (1968) AND THE CONSENT OF THE PETITIONER WAS VOLUNTARY AND KNOWINGLY MADE.

Many items of evidence were taken from the petitioner's apartment during a search and examination. (R pp 59-61). The search was pursuant to a written voluntary consent to search form signed by the petitioner at approximately 5:21 p.m. on August 28, 1980. (R p 72). The petitioner signed this form after having consulted with a friend of his, Bobby Woods, and after having had the form read to him (R p 72), the voluntary consent form, as set out in the facts, supra, informed the petitioner that he was not required to consent to the search and that the officers were without authority to make such a search and seizure without a search warrant unless he consented thereto. The petitioner was then released from custody and presumably went to his apartment. At 8:00 the law enforcement officers arrived at the petitioner's apartment (R pp 198, 199) and informed him that they had obtained a search warrant. They then began the search. The petitioner assisted them in the search by opening a toolbox. (R p 84). The petitioner was placed under arrest at approximately 8:00 or 9:00 p.m. that evening (R p 173). The trial concluded that the petitioner voluntarily, willingly and understandingly consented to the search of his premises on August 28, 1980 and that any item seized as a result of the search were admissible. (R pp 184-85).

The petitioner does not contend that the consent to search was obtained with coercion, duress or fraud and was not freely given in accordance with the requirements of Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The officers went the extra mile in assuring the consent was knowingly and intelligently given. He was informed of his right to refuse to grant consent even though this was not required. See United States v. Watson, 423 U.S. 411, reh. den. 424 U.S. 979 (1975); United States v.

Matlock, 415 U.S. 164 (1973); Washington v. Crisman, 455 U.S. 1 (1982).

The petitioner does contend, however, that despite the knowing and voluntary consent to the search at 5:21 p.m. and the lack of any evidence of withdrawal of the consent, the mere fact that the State obtained a search warrant negates a finding of consent. It is the position of the petitioner that Bumper v. North Carolina, 391 U.S. 543 (1968), prohibits all consentual searches if a search warrant is ever obtained.

It is true that Bumper and subsequent cases have held that any "consent" given in the face of a colorably lawful coercion cannot be used to validate otherwise illegal acts. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979). These cases, however, do not apply because the State, in both cases, attempted to show consent to a search by the actions of a defendant in allowing a search to be carried out after a search warrant was obtained. Neither of these cases is based upon a prior voluntary consent to search being obtained and subseq to that time a warrant being issued. They are of no support to the petitioner.

The sole question presented here is whether the petitioner (1) can withdraw his consent to search and (2) are we required to infer that he would have withdrawn his consent had a warrant not been read. The petitioner, himself, says that the courts have not addressed the issue of withdrawal of consent to search. There may in fact be some right of withdrawal of consent but there is no evidence presented anywhere in the record that the petitioner did anything except cooperate. Throughout the whole interrogation and search he at no time indicated an intention to withdraw his consent.

The second issue is whether the doctrine set forth in Bumper should be extended to hold that a search conducted in reliance upon a consent and a search warrant cannot be later justified on the basis of consent, if the warrant is not shown

to be valid, because of the possibility of withdrawal of consent. That carries the holding in Bumper much further than this Court could possibly want. Especially in the case at bar, the petitioner cooperated during the interrogation, signing the consent form, assisting in the search of his apartment and at no time showed any desire for an attorney or to exercise any other constitutional right. One state has considered a similar situation. In Carlson v. Superior Court of San Diego County, 58 Cal.App.3rd 13, 129 Cal.Rptr. 650 (1976), the defendant sought to suppress evidence found pursuant to a search. The investigator had obtained the informed voluntary consent of the defendant to search his premises. During the course of the search the investigator sought to obtain a warrant over the telephone which the court ruled was an invalid warrant. Nevertheless, the Court of Appeals of California held that the original consent to search was valid and therefore the entire search was valid.

This Court should not grant certiorari upon this issue. The North Carolina Supreme Court was correct when it held:

> Defendant cites no authority for the proposition that obtaining a search warrant negates prior consent to the search. It is clear from the record before us that the State relied on a consentual search and, as discussed above, the trial court properly ruled that defendant's consent was freely and voluntarily given. We cannot agree with the defendant's reasoning that obtaining the warrant negates the consent originally given. Assuming the State had a valid search warrant, it has had two basis to justify the search of the defendant's apartment. At trial, the State had every right to rely on either.

293 S.E.2d at 582.

This issue does not raise an important constitutional question.

III. THE SUPREME COURT OF NORTH CAROLINA INTERPRETED THE PROVISIONS OF G.S. 15A-2000 AS A MATTER OF STATE LAW WHEN REQUIRING THE IMPOSITION OF THE DEATH PENALTY IN ALL CAPITAL CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FOUND TO OUTWEIGH MITIGATING CIRCUMSTANCES AND THIS INTERPRETATION IS NOT REPUGNANT TO CONSTITUTIONAL PRINCIPLES.

The Supreme Court of North Carolina, in State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982), petition for cert. filed 82-5353; State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982), cert. filed No. 82-5335, State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982), cert. filed No. 82-5352, explicitly held that the language of G.S. 15A-2000(b) and (c) require the trial court to charge the sentencing jury in a first degree murder case that if a jury found beyond a reasonable doubt that (1) one or more statutory aggravating circumstances exists, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstnaces, then the jury must recommend a sentence of death. These holdings were consistent with previous instructions given, even though the state supreme court had not specifically addressed this issue. See North Carolina Pattern Instructions, Crim. § 150.10 (Replacement, 1980). State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. den. 448 U.S. 907 (1980), reh. denied 448 U.S. 918 (1980), cert. den. 102 S.Ct. 494 (1981), reh. denied 102 S.Ct. 693 (1981), habeas corpus petition dismissed sub nom Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. den. ___ U.S. ___, 102 S.Ct. 431 (1981); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. den. ___ U.S. ___, 102 S.Ct. 1741 (1982).

As in State v. Pinch, supra; State v. Smith and State v. Williams, the petitioner here attacked the instructions given by the trial court in this case in the Supreme Court of North Carolina on the basis that the instructions violated the statutory rights under G.S. 15A-2000 and the United States Constitution since instructions "withdrew from the jury its

final option to recommend a life sentence notwithstanding its earlier findings." State v. Pinch, supra, 292 S.E.2d at 227.

The North Carolina Supreme Court in the petitioner's case adopted the reasoning of Pinch, Smith and Williams in overruling the petitioner's assignment of error. The State has previously made known its position in the response to the petition in Pinch. Respondent in this case, therefore, adopt by reference, as if fully set forth herein, the argument of the State in its response in Pinch v. North Carolina, No. 82-5353. A copy of this portion of the State's response is attached to this response as Appendix A.

In the petitioner's case here, the mandatory instruction could not have made any difference. The heinousness of the two crimes as set forth in the statement of the case would preclude any jury from possibly recommending life imprisonment over death. The North Carolina Supreme Court restriction on the exercise of discretion by the jury raises no federal question and is entirely consistent with the holdings of this Court.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that David J. Brown's Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted, this the 15th day of November, 1982.

RUFUS L. EDMISTEN
Attorney General

Isaac T. Avery III

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Isaac T. Avery, III, Special Deputy Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing Response to Petition for Writ of Certiorari upon the Attorney of Record of Petitioner David J. Brown, by depositing same in the United States Mail, first class postage prepaid, and properly addressed as follows:

Mr. James R. Van Camp
Van Camp, Gill & Crumpler, P.A.
Post Office Box 1389
Pinehurst, North Carolina 28374-1389

This the 15th day of November, 1982.

Isaac T. Avery, III
Special Deputy Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629

This Court ought not grant its writ to review this issue on mitigating factors. There was no error of Federal constitutional law in the charge; likewise, there was no clear showing of improper restriction of evidence in mitigation in violation of this Court's ruling in Lockett v. Ohio, supra. There is, therefore, no vital question of Federal law presented for this Court's consideration.

III. THE SUPREME COURT OF NORTH CAROLINA INTERPRETED THE PROVISIONS OF G.S. 15A-2000 AS A MATTER OF STATE LAW AND THIS INTERPRETATION IS NOT REPUGNANT TO CONSTITUTIONAL PRINCIPLES.

The Supreme Court of North Carolina, in State v. Pinch, supra; State v. Smith, 305 N.C. 691, 292 S.E. 2d 264 (1982); and State v. Williams, 305 N.C. 656, 292 S.E. 2d 243 (1982) (all handed down on June 2, 1982) explicitly held what had been previously assumed concerning the proper reading of G.S. 15A-2000.[5] The Court construed the language of G.S. 15A-2000 (b) and (c) to require the trial court to charge the sentencing jury in a first degree murder case that if a jury found beyond a reasonable doubt that (1) one or more statutory aggravating circumstances existed, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

Pinch had attacked the instructions given by the trial court in his case in the Supreme Court of North Carolina on the basis that the instructions violated his statutory rights under G.S. 15A-2000 and the United States Constitution since

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[5]North Carolina Pattern Instructions, Crim. §150.10 (Replacement, 1980). State v. Barfield, supra; State v. Martin, 303 N.C. 246, 278 S.E. 2d 214, cert. denied ___ U.S. ___, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied ___ U.S. ___, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

the instructions "withdrew from the jury its final option to recommend a life sentence notwithstanding its earlier findings." State v. Pinch, supra, 292 S.E. 2d at 227. Now, realizing that a state may constitutionally require a recommendation of death upon the making of certain findings by the sentencer (Jurek v. Texas, supra; Adams v. Texas, supra), Pinch has shifted his ground. Instead of claiming a Federal question is presented because the State's interpretation of the North Carolina death penalty statute is unconstitutional - the claim made below - Pinch now suggests that a Federal question for review exists for this Court because the Supreme Court of North Carolina allegedly misread Furman v. Georgia, 408 U.S. 238 (1972) and its progeny and felt bound, as a matter of Constitutional law, to construe G.S. 15A-2000 to require a death penalty recommendation if all the issues in G.S. 15A-2000(c) are answered affirmatively. If it were true that the Supreme Court of North Carolina had acted as it did solely because it misconstrued this Court's decisions, then a Federal question is presented: United Airlines v. Mahin, 410 U.S. 623 (1973). However, a fair and complete reading of the portions of the Supreme Court of North Carolina's opinions dealing with this issue in State v. Pinch, supra; State v. Smith, supra; and State v. Williams, supra all reveal that the Supreme Court of North Carolina's construction of G.S. 15A-2000 to require a recommendation of death after certain findings are made was not based on a perceived constitutional requirement, but rather on a plain reading of the statute itself.

In State v. Pinch, supra, the case upon which State v. Williams, supra and State v. Smith, supra largely rely, the Court held that the instruction to the jury that they must return a recommendation of death if they found all three

issues submitted to them for consideration was proper, since it was based on the statutory criteria set forth in G.S. 15A-2000(b) and (c). The Court went on to say that the jury could not be allowed to exercise unbridled discretion and disregard the findings it made pursuant to G.S. 15A-2000(c), but rather must exercise guided discretion within the "carefully defined set of statutory criteria" (292 S.E. 2d at 227). The Court then cited State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979) to support the proposition that the jury may not be instructed to "disregard the procedure outlined by the legislature and imposed the sanction of death at their own whim." 298 N.C. at 35, 257 S.E. 2d at 346. (emphasis added).

The North Carolina Supreme Court in Pinch construed G.S. 15A-2000. However, the thrust of the opinion in Pinch was not that the Supreme Court of North Carolina must, for constitutional reasons, construe its death penalty statute as it did, but rather, that the jury should not be allowed in making the sentencing decision to disregard the procedure outlined by the legislature. The Court's decisions in Pinch, Smith, and Williams nowhere state the North Carolina Supreme Court felt compelled by the Federal Constitution to interpret G.S. 15A-2000 as it did, but rather reiterate a plain reading of the statute required the result reached by the Court. In fact, in State v. Pinch, supra, the Court found it necessary to add a footnote citing Jurek v. Texas, supra for the proposition that the Supreme Court of North Carolina's construction of the statute in question is Constitutionally permissible. This alone clearly indicates that the Supreme Court of North Carolina was not interpreting its statute as it did due to some feeling of Federal Constitutional mandate. However, if there is any question as to the basis upon which the majority in the case now before this Court interpreted

the language of G.S. 15A-2000, that question is resolved by referring to the opinions by the North Carolina Supreme Court in State v. Williams, supra and State v. Smith, supra. In State v. Smith, supra the Supreme Court of North Carolina stated the instruction that the jury must return a verdict of death after making certain findings "comports with the procedure contemplated in G.S. 15A-2000(b)." 292 S.E. 2d at 275. In State v. Williams, supra, the Court rejected the argument that the jury despite its findings made pursuant to G.S. 15A-2000(c) ought still be able to return a life sentence if it desired. The Court stated:

> "The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstances found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. 15A-2000(e) or elsewhere....G.S. 15A-2000(b) requires the jury to deliberate and render a sentence recommendation 'based upon' two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be 'based on these considerations' - not unbridled discretion. G.S. 15A-2000(b)(3). This specific mandate is clear - it requires no interpretation." 292 S.E. 2d at 263 (emphasis added)

Justice Exum, the lone dissenter in the matter now before the Court as well as in State v. Smith, supra and State v. Williams, supra, argued initially that the majority decided to construe the statute "as it did on the sole ground that otherwise the statute would be subject to constitutional attack." 292 S.E. 2d at 230. However, he then accused the majority of having fallen into the same logical trap in reading G.S. 15A-2000 to which he had previously succumbed when, in State v. Rook, supra he wrote that:

> "the clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances." 304 N.C. at 243, 283 S.E. 2d at 757.

As he proceeded further in the dissent, he argued that the majority in construing the statute based their construction on a misreading of State v. Goodman, supra and then, finally, while admitting under Jurek v. Texas, supra the majority's interpretation of the state statute would pass Constitutional muster, he claimed his new view of how the statute should be read was more solidly supported by the decisions of the United States Supreme Court and is closer to the legislative intent of the North Carolina General Assembly.

While initially accusing the majority of deciding the statute due to a perceived constitutional compulsion, Justice Exum then asserted the majority construed the statute as they did due allegedly to reading the statute incorrectly as he had previously done and misreading state case law. Thus, the vast part of the dissent in Pinch, which Justice Exum adopted in his dissents in Smith and Williams, reaffirms what the majority opinions in Pinch, Smith and Williams clearly show: That the statute in question was construed by the Supreme Court of North Carolina as a matter of state law.

This Court must defer to the interpretation placed on a statute statute by the highest state court where, as here, the interpretation is made solely as a matter of local law: Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Scripto v. Carson, 362 U.S. 207 (1960); c.f. Hankerson v. North Carolina, 432 U.S. 233, 244-245 (1977). The North Carolina Supreme Court's interpretation of the statute is not repugnant to Federal Constitutional mandates. Jurek v. Texas, supra. Therefore, this Court ought not issue its writ of certiorari to the Supreme Court of North Carolina since there is no Federal question here presented for review.

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NO. 82-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DAVID J. BROWN,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

AFFIDAVIT OF MAILING

STATE OF NORTH CAROLINA
COUNTY OF WAKE

ISAAC T. AVERY, III, being sworn, states:

1. I am a Special Deputy Attorney General for the State of North Carolina representing the Respondent, State of North Carolina.

2. Pursuant to Rule 28.2 of the Revised Rules of the Supreme Court of the United States, I filed the original and nine copies of the enclosed Response to Petition for Writ of Certiorari to the Supreme Court of the United States by placing them in an envelope properly adressed to the Clerk of this Court, with first class postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service within the City of Raleigh, State of North Carolina, on November 15, 1982 at approximately 2:00 p.m. EST.

Isaac T. Avery, III

Sworn to before me this
15 day of November, 1982.

Notary Public

My Commission Expires: 10/26/86

NOTARY PUBLIC
WAKE COUNTY, N.C.